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IN THE

Supreme Court of the United States

October Term, 1967

No. 1329

SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

REPLY BRIEF OF PETITIONER

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June 3, 1968

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Petitioner, Southern California Edison Company (petitioner or Edison), respectively submits this reply brief addressed to arguments first raised in the brief in opposition filed in these proceedings by the Federal Power Commission (Commission or FPC):

I

In its brief in opposition, FPC contends that further litigation is wholly unnecessary because the petitioner, who was aggrieved by the Commission's actions in this proceeding, is entirely free to advance any further proposals in new or pending proceedings (pp. 10-11 of Br. in Op.). That such contention is wholly impractical and would provide no adequate remedy or protection for the lawful rights of

an aggrieved petitioner, such as Edison in the case at bar, has heretofore been recognized by this Honorable Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 659-660 (1964), when it stated:

> "This is not a field where merchants are in a continuous daily struggle to hold old customers and to win new ones over from their rivals . . . Once the Commission grants authorization to construct facilities or to transport gas in interstate commerce, once the distributing contracts are made, the particular market is withdrawn from competition."

And the critical, practical necessity under such circumstances for a fair hearing being afforded in the comparative hearing itself was recognized by this Honorable Court in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 332 (1945), when it stated:

> "As the Fetzer application [the El Paso and Transwestern applications in the case at bar] has been granted, petitioner [Edison in the case at bar], therefore, is presently in the same position as a newcomer who seeks to displace an established broadcaster. By the grant of the Fetzer application [El Paso and Transwestern in the case at bar] petitioner [Edison in the case at bar] has been placed under a greater burden than if its hearing had been earlier. Legal theory is one thing but the practicalities are different."

Thus, the suggestion by FPC that ample protection is afforded to petitioner because it could try again before that Commission in a new proceeding flies directly in the face of the decisions referred to above, recognizing the inadequacies of such suggested remedy.

It is demonstrably clear that the Commission in the case at bar has so far departed from the accepted and usual

course of administrative proceedings and from the most fundamental requirements of procedural due process of law as to call for an exercise of this Honorable Court's power of supervision[1]. Although quite a number of illustrations of such departure by the Commission might be cited, in the interest of brevity we list but two here:

First, the circumstance, that the Commission does not deny, as indeed it could not, that its off-the-record economic study, which played a major and decisive role in its decision, was predicated upon a defective gas balance study which was also off-the-record and never disclosed to the parties until its decision denying rehearing; such study admittedly postulated a zero gas balance in storage at a time of need (Footnote 9 of FPC brief in opposition and FPC brief to the Third Circuit, p. 25) and thus postulated a method of operation that no one claims (and no one with any expertise could claim) the system could be operated under; admittedly the purchase of more gas would be required, in order for the system to operate, and the admittedly higher costs involved in the purchase of such additional gas were nowhere reflected in the off-the-record economic study so utilized by the Commission as the principal basis for its decision;

Second, the circumstances that the Commission admittedly referred in its decision to a number of outside-the-record reports, one of which was entitled "Comparison of Coal Fired and Nuclear Power Plants for the TVA System" and, as clear evidence of its reliance on such report, stated:

> "Whatever merits Gulf Pacific's position may have had in 1964 when testimony on this subject was taken, it *now* appears that nuclear generation is meeting this economic test." (Op. No. 500, R. 68853; Jt. App. p. 771, emphasis added).

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[1]C.f. Rule 19 of the Court Rules.

The Commission's only response to the first item, *supra*, is that the off-the-record studies utilized figures or data that were in the record. It is presumably contending that if a Commission's off-the-record study,[2] no matter how erroneous or inexpert it may be shown to be, utilizes data taken from the record (even if such data were submitted in the hearings in a different context or study where it might have been correctly employed and have required no cross-examination), the requirements of procedural due process have been met. Such contention, we submit is patently unsound, and is not supported by the cases to which the FPC refers.

In response to the second item, *supra*, the Commission states, in its footnote 11 of its brief in opposition, that the off-the-record material utilized by the Commission was merely cumulative. We submit that such explanation, as noted in the dissenting opinion, is not fairly reconcilable with the statement quoted above from the opinion of the Commission at the time of its decision. (See Dissent to Opinion No. 500-A, R. 69330, Jt. App., p. 1073.)

It is, we submit, thus abundantly clear that the procedures followed by the Commission involved a denial of the most fundamental requirements of a fair hearing and of procedural due process of law.

The petitioner's opportunity to return to the Commission in a new proceeding, as suggested in the FPC's brief in opposition (in all probability for more of the same in the absence of judicial redress in the case at bar) is obviously

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[2]See the corrected study (App. D to petition) submitted to the Court of Appeals by petitioner, demonstrating the significance of the errors in the Commission's off-the-record study which could have been demonstrated had any opportunity to do so ever been afforded.

no substitute for petitioner's remedy to seek justice and due process of law from this Honorable Court.[3]

In this connection, the references by the Commission, in its brief in opposition, to the circumstances that the Gulf Pacific Pipeline Company has been dissolved and that the principal underlying gas supply contracts have been cancelled provide no support for FPC's position. Following the decisions in *City of Pittsburgh v. FPC*, 237 F.2d 741 (1956), and *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (1965), cert. den. 384 U.S. 941, the Commission has consistently recognized the right of a party to such proceedings to present evidence concerning better alternatives (even in the absence of any gas supply contracts or of any application being filed with respect to such alternative projects), and any failure of the Commission to accord such party due process in connection with such showing would entitle such aggrieved party to judicial relief. To illustrate, the Commission's own staff, in the pending proceedings referred to in footnote 15 of the Commission's brief in opposition, proposed, as a desirable alternative project, a new 42-inch pipeline project with respect to which there were no committed gas supplies whatsoever and no applicant. Furthermore, the record in this case shows a continuing interest in the California market by the major Gulf Pacific Project supplier, namely, Humble Oil and Refining Company, if the Commission is reversed in the case at bar (R. 69160-1, Jt. App. 997-8). In accord with such decisions, the Third Circuit Court of Appeals

[3]An appropriate form of legal remedy, suggested by the petitioner, that would protect its lawful rights, is set forth in its petition, pp. 34-A to 36-A. Furthermore, such relief would impose no added risk upon Transwestern or El Paso different from that which was represented to the Commission as being a risk which both were ready, willing and able to assume. (See Edison's answer to El Paso's Motion to Dismiss filed with Third Circuit p. 12).

correctly denied Transwestern and El Paso's motions to dismiss this case which were predicated upon the same circumstances referred to by the Commission.

II

Point 3 of the FPC's argument, in its brief in opposition, at pages 8-9, demonstrates the accuracy of Edison's contention that the Commission arbitrarily changed the ground rules which it had previously established as justification for its delays in processing the Gulf Pacific project application, because it shows that FPC did, in fact, abandon any long term resolution of the problems in favor of what it terms a "periodic reappraisal of supply needs rather than by approval of the Gulf Pacific Project". And, consider this anomaly which FPC's brief in opposition fails to bring to the Court's attention: the "larger facilities", referred to in the decision in the pending FPC proceedings, summarized in footnote 15 of FPC's brief, relate to a proposed new 42-inch pipeline from Texas (as compared with Gulf Pacific's proposed new 36-inch pipeline from Texas) initially suggested by the FPC staff to be built by El Paso because of its long term advantage. If constructed such "larger facilities" would, of course, similarly preclude such periodic reappraisal, and FPC's staff admitted its proposal would preclude any new competitive pipeline to California for many years to come. In this connection, FPC's staff has taken the position, in that proceeding, that there is nothing in the decisions of this Court in *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) or in the related cases of *California v. FPC*, 369 U.S. 482 (1962) or *United States vs. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), requiring FPC to "stay its hand in granting any expansion larger than that proposed by El Paso in order to permit the new company to be formed as a result of the divestiture proceedings to compete for future

growth in California". So the FPC staff is once again urging a reversal of the field.

III

On page 5 of its brief in opposition FPC asserts that the question, discussed in Edison's petition (pages 20-24, relating to the Commission's preemption of the field of air pollution in a manner which frustrated local police regulations), was not raised before the Court of Appeals. This assertion is simply not accurate:

1. Edison's petition for review before the Third Circuit not only incorporated Edison's petition for rehearing before the Commission raising this issue (see R. 68974, 68979, 68997-69000, Jt. App. pp. 884, 889, 907-910) but in addition at pages 11-12 of Edison's petition for review to the Third Circuit Court of Appeals the following appeared:

> "3. The Commission erred by its improper application of the statutory standards involved.
>
> "a. It applied the standard of public convenience and necessity in an improper manner in denying higher levels of gas service as demanded by the public in southern California simply because it did not agree with the public's desires or reasons therefor, although, in so doing, it made no finding and expressed no determination that the satisfaction of the public demands in this regard would deprive other areas of adequate gas service."
>
> • • •
>
> "4. The Commission arbitrarily, capriciously and erroneously frustrated the authority of the local police regulations relating to air pollution in a situation in which there was no conflict or incompatibility with any federal policy, and at the same time arbi-

trarily, capriciously and unlawfully purported to delegate to the California authorities a responsibility which they cannot, so long as the Commission's opinion remains unreversed, exercise or comply with. The Commission also arbitrarily and improperly refused, in this connection, to exercise its appropriate authority to protect the electric utilities from an unworkable dilemma and to permit them to operate most economically."

2. In Edison's brief before the Third Circuit, the petitioner stated, in part, as follows, at page 40:

> "If the Commission did not intend to pre-empt the field, it should have given due recognition and effect to local police regulations (cf., *Huron Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960); *Welch Co. v. New Hampshire*, 306 U.S. 79, 85 (1939). Under these circumstances, the Commission's denial of the Gulf Pacific Project, the certification of which would best permit compliance by the electric utilities with such local police regulations and which met the traditional tests of public convenience and necessity, represents a denial of their recognized rights and a violation of due process of law."

The Commission's newly indicated concern, reflected on page 12 of its brief in opposition, over any circumventions of local air pollution regulations, is both tardy and more than somewhat strange because: (a) the Gulf Pacific Project admittedly would have permitted higher levels of gas use for electric generation and would have significantly reduced the level of oil burning in southern California (R. 303-7, Jt. App., pp. 6-8, R. 18156, 18419-22, Jt. App., pp. 131-4, Ex. 639, 640, R. 35979-82, Jt. App. p. 364-7) all in compliance with the provisions and goals of the local air pollution control regulations, designed to increase the use

of natural gas for such purposes and in accordance with the desires of the public in southern California (R. 422-3, Jt. App. pp. 17-18), (b) it was the FPC that concluded that the local air pollution control authorities were wrong in their view that the substitution of natural gas for the burning of fuel oil would significantly assist in air pollution control (Op. 500, R. 68839, Jt. App. p. 757), and (c) it was the Commission, not Edison, that pre-empted the field and frustrated the desires of the air pollution control authorities and the public in southern California.

In the case at bar, the actions of the local air pollution control authorities, which were in no way in conflict with the national air pollution policies or the federal agencies directly responsible therefor (such as the Department of Health, Education and Welfare)[4], were frustrated by the actions of the FPC simply because FPC did not agree with such local agencies and the public's desires or reasons therefor, although, in so doing, it made no finding and expressed no determination that the satisfaction of the public's demands in this regard would deprive any other areas of adequate gas service. In this connection the position of FPC here, attempting to justify preemption of the air pollution field (Br. in Op., pp. 5-6), is difficult to reconcile with its position in *re El Paso Natural Gas Co.*, Docket G-12580, Opinion No. 333 (22 FPC 900, 903) that the California authorities "have the best knowledge of the smog problems" and that their expertise should not be preempted.

We respectfully submit that, with the increasing importance and significance, to the national and local public interest, of air pollution and its related control problems,

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[4]E.g., Executive Order 11282 dated May 26, 1966 relating to restrictions on governmental installations and Title 42 C.F.R. Part 76, issued June 2, 1966. See other references in footnote 17, p. 22 of petition.

and the efforts of the local agencies to meet such problems in ways which conform to the policies of the federal authorities given direct responsibilities over air pollution, the important legal questions posed, as to the extent to which those efforts can be restricted and frustrated by the FPC in the exercise of its functions under the proper interpretation of the Natural Gas Act and the need for a judicial delineation of the areas of responsibility under the existing statutes of the agencies thus involved, merit consideration and determination by this Honorable Court.

Petitioner believes that the other arguments raised in the Commission's brief in opposition were anticipated and adequately covered in Edison's petition heretofore filed, to which this Honorable Court's attention is respectfully directed for a fuller statement of the grounds upon which Edison urges that its Petition For a Writ of Certiorari be granted.

Respectfully submitted,

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DATED: June 3, 1968.